Kong Inn Seafood Restaurant Sdn Bhd v Ang Pun Seng & Anor

HIGH COURT (JOHOR BAHRU) — WRIT OF SUMMONS NO JA-22NCVC-113–05 OF 2017
MOHD IVAN JC
19 FEBRUARY 2018

Civil Procedure — Summary judgment — Triable issues — Whether triable issues raised — Tenancy agreement — Expired tenancy agreement — Whether there was valid agreement

The plaintiff was a tenant that operated a restaurant on premises belonging to the defendants. The plaintiff claimed that he had the right to continue to rent the premises despite the tenancy agreement having expired. The defendants denied that there was an extension agreed upon and had further made a counterclaim for vacant possession, rental and mesne profits that arose from the holding over of their premises by the plaintiff. The defendants had filed an application under encl 7 for summary judgment against the plaintiff under their counterclaim. The plaintiff had to prove that there were triable issues to defeat the encl 7 application and for the matter to proceed to trial.

Held, allowing application under encl 7 with costs of RM5,000:

(1) The plaintiff had not raised any triable issue. In the circumstances, there was no agreement reached between the plaintiff and defendant. As there was no agreement between the parties, there could not have been any breach of the same. There was no legal point that needed to be explored during trial for the plaintiff to claim to be entitled to remain at the premises (see paras 34 & 39–40).

[Bahasa Malaysia summary

Plaintif adalah penyewa yang menjalankan restoran di atas premis yang dimiliki oleh defendan-defendan. Plaintif mendakwa bahawa dia mempunyai hak untuk terus menyewa premis tersebut meskipun perjanjian penyewaan telah tamat. Defendan-defendan menafikan bahawa terdapat pelanjutan yang dipersetujui dan selanjutnya membuat tuntutan balas bagi milikan kosong, sewa dan keuntungan mesne yang berbangkit daripada pegangan ke atas premis mereka oleh plaintif. Defendan-defendan telah memfailkan permohonan di bawah lampiran 7 untuk penghakiman terus terhadap plaintif di bawah tuntutan balas mereka. Plaintif perlu membuktikan bahawa terdapat isu-isu yang boleh dibicarakan untuk permohonan lampiran 7 dan untuk perkara tersebut diteruskan kepada perbicaraan.

Diputuskan, membenarkan permohonan di bawah lampiran 7 dengan kos sebanyak RM5,000:

(1) Plaintif tidak membangkitkan apa-apa isu yang boleh dibicarakan. Dalam keadaan itu, tidak terdapat perjanjian yang dicapai di antara plaintif dan defendan. Memandangkan tidak terdapat perjanjian di antara pihak-pihak, tidak mungkin terdapat apa-apa kemungkiran terhadapnya. Tidak terdapat poin undang-undang yang diperlukan untuk diguna pakai semasa perbicaraan untuk plaintif mendakwa sebagai berhak untuk kekal di premis tersebut (lihat perenggan 34 & 39–40).]

Notes

For cases on triable issues, see 2(5) *Mallal's Digest* (5th Ed, 2017 Reissue) paras 10368–10369.

Cases referred to

National Company for Foreign Trade v Kayu Raya Sdn Bhd [1984] 2 MLJ 300, FC (refd)

Legislation referred to

Rules of Court 2012 O 14, O 14 r 5

Gan Techiong (Gan & Lim) for the appellant.
Jimmy Phua (SK Song) for the respondent.

Mohd Ivan JC:

[1] At the material time, the plaintiff was a tenant operating a restaurant at premises belonging to the defendants.

[2] Despite the tenancy agreement having expired, the plaintiff is claiming in this action that the plaintiff had the right to continue to rent the premises.

[3] By way of its defence, the defendants denied there was any extension agreed upon after the expiry of the tenancy agreement, whereby the defendants have added a counterclaim for vacant possession, rental and mesne profits arising from the holding over of their premises by the plaintiff from April 2017 until date of delivery of vacant possession of the premises.

[4] After the defendants had entered an appearance, and filed their defence and counterclaim, the defendants have upped the ante by filing an application under encl 7 for summary judgment against the plaintiff under their counterclaim.

[5] Procedure wise, after an application for summary judgment and the supporting affidavit in respect of its counterclaim had been served on the plaintiff, the onus has now shifted to the plaintiff to show whether there are triable issues to defeat the application and for the matter to proceed to trial.

[6] The case of *National Company for Foreign Trade v Kayu Raya Sdn Bhd* [1984] 2 MLJ 300 sets out the requirements for an O 14 application:

> We think it appropriate to remind ourselves once again that in every application under O 14 the first considerations are (1) whether the case comes within the order and (b) whether the plaintiff has satisfied the preliminary requirements for proceeding under O 14. For the purposes of an application under O 14 the preliminary requirements are:
>
> (i) the defendant must have entered an appearance;
>
> (ii) the statement of claim must have been served on the defendant; and
>
> (iii) the affidavit in support of the application must comply with the requirements of r 2 of the O 14.

[7] This applies equally in the case of a counterclaim, where under the provisions of O 14 r 5 of the ROC 2012, an application for summary judgment can be made on a counterclaim.

[8] In its supporting affidavit, the defendants have exhibited the tenancy agreement, which was dated 1 March 2016 for a period of one year from 1 April 2016–31 March 2017 at a monthly rental of RM5,000.

[9] The defendants have further relied on a letter of demand dated 20 April 2017 issued by their solicitors to the plaintiff for the premises to be surrendered with vacant possession.

[10] The plaintiff had filed an affidavit in opposition through its director, Aun Chin Poh, who had averred that the tenancy started back in 2004 initially under his personal capacity, then as tenant, until the plaintiff was incorporated as a company.

[11] He had averred that extensive renovations had been done to the premises on the understanding that a longer period of tenancy would be allowed, but this was not reflected in any agreement before this court.

[12] He also shed light on an arrangement where only a portion of the rental would be recorded in the tenancy agreement as the monthly rental, with another sum paid annually in addition to the monthly rental.

[13] This was the arrangement preferred by the defendants which the plaintiff had seemingly acceded to, and had practised all the while for the tenancy of the defendants' premises.

[14] Coming to the present in 2016, in addition to the monthly rental of RM5,000 given by way of 12 post-dated cheques, it was not in dispute that there was an additional sum of RM60,000 paid.

[15] However, in 2017, after the 12 post-dated cheques for monthly rental of RM5,000 had been tendered by the plaintiff to the defendants as per usual, a sum paid annually in addition to the monthly rental of RM5,000 under the tenancy agreement was increased by the defendants from RM60,000 to RM84,000.

[16] This was where controversy set in, whereby the plaintiff did not agree to pay.

[17] The reason for the plaintiff not agreeing to pay was stated in para 13 of the plaintiff's affidavit in reply affirmed by Aun Chin Poh on 4 July 2017 where he stated as follows:

> Walaupun tempoh penyewaan hartanah tersebut telah jelas dilanjutkan selama 12 bulan sehingga 31-12-2017 dan 12 keping cek Plaintif telah pun diterima oleh pihak Defendan dan mula dikemukakan kepada bank untuk bayaran sewa tahun 2017, Defendan Kedua telah secara mengejut meminta bayaran wang tunai sebanyak RM84,000 sebagai bayaran sewa tunai untuk tempoh penyewaan 1-1-2017 hingga 31-12-2017. Saya telah enggan membayar kerana jumlah RM84,000 yang diminta olehnya lebih jauh tinggi dari RM60,000 (RM5,000 x 12). Keadaan pembayaran sebahagian sewa melalui wang tunai menimbulkan masaalah penyediaan akaun syarikat untuk syarikat Plaintif kerana auditor syarikat telah meminta saya meminta resit-resit bayaran dari Defendan Kedua tetapi dia enggan beri resit.

[18] This resulted in the defendants allowing the tenancy to run its course and presenting only the first three cheques for the monthly rentals for January, February and March 2017 in line with the tenancy agreement.

[19] Upon expiry of the tenancy agreement, the defendants then instructed their solicitors to issue the said notice to quit.

[20] Meanwhile, it is to be noted from the terms of the tenancy agreement that there was no provision made for the tenancy to be extended.

[21] The defendants did not dispute the averments by the plaintiff, but had instead described the additional payment as an 'option sum', which the

plaintiff had to pay over and above the monthly rental stipulated in the tenancy agreement in order to extend the tenancy.

[22] In fact, the defendants had roundly admitted that they had increased the sum payable by the plaintiff to be entitled to extend the tenancy, which was plainly in the way of 'take it or leave it'.

[23] As the defendants had only presented three of the 12 post-dated cheques and not returned the same, the plaintiff had construed this to be an admission of sorts that there was some arrangement in place for the plaintiff to remain in occupation of the premises till the end of 2017.

[24] The defendants had in the course of their submission for summary judgment contended that to allow the case to proceed to trial would likely give the plaintiff the full extent of their relief as the trial would only take place after the end of 2017.

[25] I have ruminated on the question of what is needed to be taken to trial by the plaintiff such that the defendants' application for summary judgment on their counterclaim cannot be sustained.

[26] The written tenancy agreement had already come to an end, whereby there were no provisions for any extension of any further tenancy period stipulated therein.

[27] Although the plaintiff may have alleged that an agreement had been achieved after 12 cheques for RM5,000 each had been tendered for the period of 1 January 2017–31 December 2017, the plaintiff was fully aware that that was not the full extent of rental payable and that an additional sum would be payable, which would not be recorded in the tenancy agreement.

[28] The plaintiff had previously accommodated the arrangement preferred by the defendants for an undeclared portion of rental to be payable in one lump sum in addition to the sum of RM5,000 per month rental recorded in the tenancy agreement.

[29] If such an arrangement had been viewed to be irregular or improper by the plaintiff or its auditors, the plaintiff can always refuse to accede, thereby making a business decision not to rent the defendants' premises on such terms.

[30] The defendants have surely no means to force the plaintiff to rent their premises on whatever peculiar terms they saw fit to impose.

[31] On the contrary, the plaintiff had even agreed that it was the difference in the additional payment between RM60,000 and RM84,000 that was in issue, and that as a result, parties could not agree.

[32] It would appear that the issue that the plaintiff wants to canvass during a trial was as to what was the additional (annual) payment over and above the RM5,000 monthly rental declared in a tenancy agreement that the defendants could rightly impose in order for the plaintiff to be allowed to continue to rent the premises.

[33] In short, there has been an admission that no agreement had been reached due to an impasse.

[34] To my mind there is no legal point that needs to be explored during a trial for the plaintiff to claim to be entitled to remain at the premises on what it perceived to be its terms.

[35] There was certainly no issue of equitable tenancy arising out of renovations previously done at the premises, which renovations were done when the tenancy was under the name of individual before the plaintiff was incorporated.

[36] In any event, the tenancy agreement entered in the name of the plaintiff as an incorporated entity had never preserved, or carried forward, this alleged 'equity'.

[37] However, the undisputed evidence distilled from the affidavits exchanged is that no agreement had been reached. The defendants have asked for RM84,000 which the plaintiff had complained to be too high from the previous amount of RM60,000.

[38] There is nothing to stop the defendants from asking whatever price they want to rent their premises. It may perhaps be different if the tenancy agreement had provided for an extension clause, where any increase in rental had been subject to a ceiling or maximum.

[39] In all the circumstances, no agreement can be said to have been reached. As there was no agreement, by the same token, there cannot be any breach thereof.

[40] I find that the plaintiff has not raised any issue that needs to be taken to trial.

[41] I would therefore allow the application under encl 7 for summary judgment in respect of the defendants' counterclaim against the plaintiff with costs of RM5,000 subject to allocatur.

Application under encl 7 allowed with costs of RM5,000.

Reported by Fatin Mohd Ismail